KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036

(202) 955-9600

FACSIMILE
(202) 955-9792
www.kelleydrye.com

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
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JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

DIRECT LINE: (202) 887-1248
EMAIL: rbuntrock@kelleydrye.com

August 27, 2003

VIA ELECTRONIC FILING

Marlene Dortch, Secretary,
Federal Communications Commission
445 12th Street SW
Room TWB-204
Washington, DC 20554

Re: CC Docket 02-33, Framework for Broadband Access to the Internet over Wireline Facilities; CC Docket 01-337, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services

Dear Ms. Dortch:

Yesterday, Christopher McKee and Douglas Kinkoph of NuVox Communications, Brad Mutschelknausnn and the undersigned of Kelley Drye & Warren LLP, on behalf of XO Communications, met with Scott Bergman, Legal Advisor to Commissioner Jonathan Adelstein, to discuss issues related to the above referenced proceedings. In particular, the parties urged the Commission to reject the tentative conclusions set forth in the above referenced dockets, including re-defining wireline broadband transmission under a new definition that would effectively overturn the Commission's *Computer Inquiries*. In addition, XO urged the Commission to refrain from adopting harmful tentative conclusions regarding changes to its TELRIC rules in a forthcoming NPRM. The attached materials were provided.

In accordance with the Commission's rules, one electronic copy of this notice and the attached materials are being provided for inclusion in the above referenced dockets.

Respectfully submitted,

Ross A. Buntrock

cc: Jonathan Bergmann, Legal Advisor, Commissioner Jonathan Adelstein

Appropriate Framework For Broadband Access to the Internet Over Wireline Facilities

FCC Review of TELRIC

CC Docket 02-33

CC Docket 01-337

August 26, 2003

XO Communications

Overview

Wireline Broadband

- UNE-Based Competition Brings Broadband to Small and Medium Sized Businesses
- The Definitional Shell Game Makes No Sense – Wireline Broadband Internet Access Is Still an Information Service that Rides a Telecommunications Service
- CLECs' Ability to Use UNEs and ILEC UNE Unbundling Obligations Should Not Be Limited In this Proceeding
- Any "Relief" Granted to the Bells Should Apply Only to Residential Retail Services Under Title II

Overview (cont'd)

- **TELRIC**
  - The FCC Prudently Should Decline to Reach Tentative Conclusions in an NPRM
  - Tentative Conclusions Can Create Tremendous Instability
  - Any Changes to TELRIC Must Be Made Through the Public Rulemaking Process – Where All Sides Can Participate Fairly

UNE-Based Competition Brings Broadband to Business

- Using DS1 UNE loops, CLECs have become the leaders in bringing broadband service offerings to small and medium sized business.
- T1 products are provisioned with a combination of UNEs and CLEC facilities, resulting in a robust growth opportunity for equipment manufacturers.
- This proceeding threatens CLEC access to facilities needed to provide broadband and thereby threatens investment and innovation.
- There is no demand dilemma (the "take rate" here is high – SMBs are generating a strong demand for CLEC broadband T1 service offerings).

The Definitional Shell Game Makes No Sense

- The proposed redesignation of high speed "broadband" transmission services under an alternative statutory definition is neither legally sustainable, nor does it make sense as a policy matter.
- The Commission should not use this proceeding to overturn the Commission's *Computer Inquiries'* conclusions that broadband transmission, such as wireline broadband transmission used to provide access to the Internet, is a telecommunications service.
- ILEC assertions that elimination of Title II regulation will lead to lower end user prices and "increased competitive pressure" are baseless and contrary to common sense, as well as the Commission's *Computer Inquiries* conclusions.
- The *Triennial Review Order* should give the ILECs all the "relief" they need without jettisoning Title II obligations.

The Record Does Not Support Overturning Current UNE Unbundling Obligations

- As the *Triennial Review Order* recognizes in adopting a presumption of impairment for T1 and DS3 enterprise loops, ILECs are dominant in the provision of high speed services to SMBs.
- In the rare instance where that is not the case, the *Triennial Review Order* framework will ensure that ILECs get relief.
- Direct ILEC competition with cable modem service is virtually non-existent in the SMB market.
  - The ILECs are not being crushed in head-on competition with cable anywhere in the SMB market.
  - VZ admits that cable passes only 2.5 million of the estimated 10.5 million SMBs (See VZ 1/15/03 ex parte).
- Bottom line: there is no evidence that investment in broadband is lagging, and it is counter-intuitive to promote investment by incumbents at the expense of competition (and investment by CLECs and ISPs).

To the Extent "Relief" Is Needed It Should Apply Only to Residential Retail Services Under Title II

- Adopting the Bells' legal theory that they provide no "telecommunications services" whenever their offerings include information services will establish a contamination theory by which the ILECs could contaminate their way out of all regulation.
- By determining that the transmission component of such an offering is no longer a "telecommunications service", but rather "telecommunications", the FCC will create a firestorm of controversy over CLECs' ability to use UNEs to provide wireline broadband Internet access (exclusively or in conjunction with other qualifying services) – as they have done in head-to-head competition with the ILECs for years.
  - Any decision with respect to ILEC wireline broadband transmission in this proceeding should not limit CLECs' ability to use UNEs in head-to-head competition with the ILECs.

To the Extent "Relief" Is Needed It Should Apply Only to Residential Retail Services Under Title II (cont'd)

- Without empirical evidence to show that regulations are inhibiting the deployment of advanced services, the Commission cannot compromise the statutory goals of competition, universal service, consumer protection and law enforcement assistance.

- If ILECs are facing intermodal competition from cable in the residential retail market, that is where the Commission should focus its consideration of eliminating regulatory burdens.

- Eliminating regulatory burdens should be done within the context of Title II, not by reclassifying the underlying transmission component as something other than a telecommunications service.

TELRIC: The FCC Should Decline to Reach Tentative Conclusions in an NPRM

- **The FCC should not prejudge outcomes by issuing adverse tentative conclusions**
  - Adverse tentative conclusions will inflict serious harm on carriers and on consumers, just as some certainty is being provided by the *Triennial Review Order*.
  - Adverse tentative conclusions will drive capital away from the competitive industry just as it is showing signs of financial stabilization and consumers are beginning to realize the benefits of competition.
  - Adverse tentative conclusions unfairly shift the burden of proof to those who believe that the FCC's current Supreme Court-affirmed TELRIC pricing construct should be retained.

TELRIC: Critical Conclusions Should Be Based on a Public Record

- The appropriate vehicle for making conclusions on TELRIC is a public rulemaking proceeding – the appropriate time for making them is after all sides have had a fair opportunity to have their say and rebut various economic theories and legal positions.
  - In this summer's "pre-proceeding", neither side knows fully what the other is saying – it is not prudent to make critical legal and public policy decisions based on hidden advocacy and a Bell-driven frenzy of "political pressure."
  - Although Wall Street, and presumably others, have had a preview of the item, CLECs have not had the opportunity to be heard or to engage in the economic analysis needed to rebut the short-run/embedded cost ("SHREC") methodology the Commission appears ready to endorse.
  - The FCC has not had the opportunity to hear from the states and to explore fully what the states actually have done under the TELRIC framework (or how any proposed conclusion may impact the rates set by the states).

Goals Must Be Predicated on the Law and Reflect the Facts

- **The Supreme Court has rejected the Bells' assertions that TELRIC inhibits investment.**
  - $55 billion in investment since the Act demonstrates that TELRIC does not inhibit investment or limit technological evolution.
  - Successful implementation of the market-opening provisions of Sections 251/252, including application of the TELRIC standard, should result in the loss of market share by dominant incumbents.
- **The *Triennial Review Order's* broadband decisions should resolve the Bells concerns; there is no need to "fix" the same "problem" twice.**
  - If the *Triennial's Review Order's* broadband "fixes" are legally sustainable, the changes to TELRIC sought by the Bells are unnecessary.
  - The impact of the changes to the cost of capital and depreciation in the *Triennial Review Order* should be assessed before any more rule modifications are made to TELRIC.

Conclusions

- Bells are not entitled to "broadband" exemption from Title II and the Commission is not empowered to give it to them via the tentative conclusions announced in CC Docket No. 02-33.
- By virtue of their control over bottleneck transmission facilities, the Bells remain *dominant* in the SMB broadband market and are not entitled to the "relief" sought in CC Docket 01-337.
- The Commission should completely avoid making tentative conclusions in an NPRM to avoid foisting more uncertainty on the industry.